LIBRARY
SUPREME COURT, U. S.

Office Supreme Court, U. S.
FILED
DEC 6 1950
CHARLES ELMORE CROPLEY

No. 433

In the Supreme Court of the United States

OCTOBER TERM, 1950

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS,

v.

CRAMPTON REFINING COMPANY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

STATEMENT AS TO JURISDICTION

STATEMENT AS TO JURISDICTION

In compliance with Rule 12, as amended, of the Rules of the Supreme Court of the United States, defendants-appellants United States of America and Interstate Commerce Commission submit herewith their statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the district court entered in this case on August 28, 1950.

OPINIONS BELOW

The report of the Interstate Commerce Commission is found in 274 I.C.C. 409. The opinion of the District Court for the Western District of Oklahoma is not yet reported. Copies of these documents are attached hereto.

JURISDICTION

The judgment of the specially-constituted, three-judge, district court, setting aside the order of the Interstate Commerce Commission, was entered on August 28, 1950. A petition for appeal is presented herewith on October 25, 1950. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment in this case on direct appeal: *Champlin Rfg. Co.* v. *United States*, 329 U.S. 29; *Valvoline Oil Co.* v. *United States*, 308 U.S. 141.

QUESTIONS PRESENTED

In *Champlin Refining Co.* v. *United States*, 329 U.S. 29, this Court upheld the power of the Inter-

state Commerce Commission, acting under Section 19(a) of the Interstate Commerce Act, to require Champlin to furnish it certain inventories, schedules, maps and charts of its pipe line property. Subsequently, the Commission, invoking Section 20(1), (2), (3), (4), and (8), and Section 6 of the Interstate Commerce Act, ordered Champlin to file annual periodical or special reports, to institute and maintain a uniform system of accounts, and to publish and file tariff schedules showing the rates and charges for its interstate transportation of refined petroleum products. This order the court below set aside as violative of the statute and the Due Process Clause. The questions presented are:

1. Whether the Commission acted within the powers granted it by the Interstate Commerce Act in entering the order.

2. Whether, if the order is within the Commission's power under the Act, the Act, as so applied, is constitutional.[1]

STATUTES INVOLVED

Pertinent portions of the Interstate Commerce Act, 24 Stat. 379, as amended, 49 U.S.C. 1, *et seq.*, provides as follows:

> Sec. 1 (1) That the provisions of this part (Part I) shall apply to common carriers engaged in—
>
> * * * * *
>
> (b) The transportation of oil or other commodity, except water and except natural or

[1] The questions presented summarize the points raised in the Assignment of Errors, which are also presented.

artificial gas, by pipe line * * * from one State * * * to any other state * * *.

* * * * *

(3) (a) The term "Common carrier" as used in this part shall include all pipe-line companies * * *.

* * * * *

Sec. 6 (1) that every common carrier subject to the provisions of this part shall file with the Commission created by this part and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established.

* * * * *

Sec. 20 (1) The Commission is hereby authorized to require annual, periodical, or special reports from carriers (as defined in this section) * * *.

* * * * *

(3) The Commission may, in its discretion, for the purpose of enabling it the better to carry out the purposes of this part, prescribe a uniform system of accounts applicable to any class of carriers subject thereto, * * *.

* * * * *

(8) As used in this section * * * the term "carrier" means a common carrier subject to this part * * *.

STATEMENT

Appellee, hereinafter referred to as Champlin, is a corporation engaged in the purchase and production of crude oil, refining, and the transportation and sale of the refined products. The greater part of the crude oil used in its business is purchased from other producers. All refining is done at Champlin's plant at Enid, Oklahoma, and the refined products are sent out through its pipeline running from Enid, through Hutchinson, Kansas, and Superior, Nebraska, to Rock Rapids, Iowa, a distance of approximately 516 miles. Champlin has storage and marketing facilities at each of these three towns, and the line has no other outlets. The products are collected in storage tanks at each of these terminals, and there loaded into trucks or tank cars for delivery to the purchaser. In some instances, further processing, called "blending," is performed after the products arrive at the terminals.

Champlin prices its products under a system which purports to quote prices f.o.b. its terminal nearest the customer. This posted price is frequently adjusted by an "allowance," which ranges from 1/8 to 1/2 cent per gallon, and is intended to meet competitive prices in the area. Although the posted price must inevitably reflect the cost of bringing the product to the terminal, no separate charge is stated for transportation. Formerly the prices were stated f.o.b. the Enid refinery, and a sum added thereto called a "differential," which was usually the railroad freight rate from Enid to the destination (usually the purchaser's place of business), less the charges from the pipe-line terminal

to final destination. This amount did not purport to state the cost of the transportation to Champlin. Furthermore, the price thus computed was often arbitrarily adjusted to meet the prices of competitors.

Champlin has apparently never carried the products of any other refiner in its line, nor has it ever offered to perfrom such carriage for the public. Since the construction of the line and its acquisition by Champlin, it has always been used for the same purpose—to transport Champlin's products to the markets at an economic advantage.

In 1941, the Interstate Commerce Commission, being of the opinion that Champlin was subject to its jurisdiction as defined in Section 1 of the Interstate Commerce Act, 49 U.S.C. 1, began proceedings to obtain valuation information from Champlin under the provisions of Section 19a of the Act, which refers for its scope to Section 1. Champlin began an action to enjoin the Commission's order in this matter. *Champlin Refining Co.* v. *United States,* 59 F. Supp. 978. This Court upheld the district court's dismissal of that action in *Champlin Refining Co.* v. *United States,* 329 U.S. 29.

Subsequently, the Commission instituted proceedings to require Champlin to comply with other provisions of the Commerce Act applicable to pipeline companies. Orders were issued requiring Champlin (1) to file annual and other reports as required under Section 20 of the Act; (2) to adopt the system of accounts prescribed by the Commission under Section 20; and (3) to file tariffs as required by Section 6 of the Act. Immediately fol-

lowing the commencement of this Commission proceeding, Champlin changed its pricing system from that in effect at the time of this Court's decision to the system described above as being in present use.[2] After a hearing, the Commission held that Champlin was subject to these requirements, and issued its order commanding compliance. *Champlin Refining Co.*, 274 I.C.C. 409 (1949).

The present action was brought in the United States District Court for the Western District of Oklahoma, under 28 U.S.C. 1336 and 2321, seeking to enjoin and set aside this order of the Commission. The majority of the court below held that Champlin is not "so engaged in transportation within the meaning of the 'Act' that the Commission may require it to transport petroleum products for others as a common carrier for hire." The court further stated that to construe the Act to apply to Champlin would violate the Due Process Clause of the Fifth Amendment to the Constitution of the United States. Judge Murrah, dissenting, saw no significant distinction between the former case and the present, and thought the situation governed by this Court's previous decision.

THE QUESTIONS ARE SUBSTANTIAL

The issues involved in this appeal are of importance to the pipe-line industry and to the Interstate Commerce Commission in exercising its jurisdiction over that industry. The principles of the district court's decision, if generally applied, might exclude from regulation a large segment of this

[2] In some instances this did not change the actual price. The practice of departing from the prices to meet competition continued.

industry. Moreover, widespread attempts to evade regulation by artificial changes in pricing methods would be invited.

1. This Court has already rejected Champlin's contention that it is not subject to the Interstate Commerce Act as a pipe line falling within the class excepted by the so-called "Uncle Sam" rule announced in *The Pipe Line Cases*, 234 U.S. 548, 562. *Champlin Refining Co.* v. *United States*, 329 U.S. 29. The situation here was distinguished from that in *Uncle Sam* on the ground that Champlin was transporting the products after refining not for its own use but for the purpose of marketing at an economic advantage, and that the pricing method used supported the view that Champlin was engaged in "transportation" within the meaning of Section 1 even though it owned the products when they were transported.

The essentials of Champlin's practices are unchanged today, as the Commission found. Champlin's changed pricing system, a mere attempt to avoid the consequences of this Court's decision, does not alter the significant economic factors in its earlier practice. Today, as at the time of the earlier decision, Champlin does not move oil for its own use, but instead operates its interstate pipe line to put its finished products in the market at the greatest economic advantage.

The application of Sections 6 and 20 here, like the application of Section 19a in the first *Champlin* case (329 U.S. 29), depends upon the reading given to the language of Section 1, defining the Act's coverage. The opinion of this Court in the first

case nowhere suggests that the definitions in Section 1 have a different meaning in their application to the various other sections. The intention of Congress expressed in the Hepburn Act was not merely to provide for the regulation of pipe-line companies which were common carriers by existing law, but instead to provide for the regulation of all pipe-line transportation, as defined in the Act. *The Pipe Line Cases,* 234 U. S. 548; *Valvoline Oil Co.* v. *United States,* 308 U.S. 141; *Champlin Refining Co.* v. *United States,* 329 U.S. 29. The district court erred in concluding that the statute did not embrace Champlin's operations.

2. The reason for the inconsistency between the decision of the court below and this Court's decision in *Champlin Refining Co.* v. *United States,* 329 U.S. 29, is the view of the district court that now, for the first time, the Commission has imposed on Champlin a common carrier status, which would require it to carry the petroleum product of others. But, as the Commission stated in its report,

> there has never been and is not now any physical connection between (Champlin's) pipe line and any other pipe line or facility which would permit the use of respondent's line by any one but its owner. So far as appears, no other pipe-line company has threatened to force such a connection, and because of the ample common-carrier pipe-line facilities available, as revealed by respondent, no refinery would be likely to interest itself in such a connection. Nor are we referred to any order of this or any other governmental agency which would require such a result, or to any law, State or

> Federal, which would support such an order. So far as appears, therefore, the filing of tariffs and of annual and other reports would not prove to be a hardship to respondent and would not deprive it of any of its traffic or of the free use of its property, including the pipe-line facilities, without interference from its competitors.

The report and accounting phases of the Commission's order certainly cannot be read as requiring Champlin to carry the oil of the others. And the tariff filing requirements have scope in that they relate to the charges Champlin may make to its customers for transporting the petroleum products it has always carried through its pipe line to the market. Thus, as Judge Murrah dissenting below put it, "There is nothing in the order of the Commission which has the effect of requiring Champlin to convert its private pipe line into a common carrier in fact. Certainly there is nothing in the order requiring Champlin to provide new inlets or outlets, or for that matter, to make any structural or operational changes in its system whatever."

3. Even if this case presented the constitutional question whether the Commission could order a so-called "private pipe line" to carry the products of others tendered to it for transport, the Government would be of the view that the court below erred in holding a statute authorizing such an order invalid. For the constitutional objections here raised were put to rest in the *Pipe Line Cases*, 234 U.S. 548.

One of the companies there involved was the

Standard Oil Company of Louisiana, which, like Champlin here, was incorporated after the passage of the Hepburn Act. With respect to such post-Hepburn act pipe lines, this Court said (234 U.S. at 561):

> So far as the statute contemplates future pipe lines and prescribes the conditions upon which they may be established there can be no doubt that it is valid.

Moreover, as pointed out in the former *Champlin* case, 329 U.S. at 35, the "power of Congress to regulate interstate commerce is not dependent on the technical common carrier status but is quite as extensive over a private carrier." The considerations which led Congress to exercise this power over traditionally private carriers are discussed in the *Pipe Line Cases*. The danger of domination of the most economical means of petroleum transportation by companies which refuse to carry the products of others has not disappeared. The Constitution does not deny to Congress power to cope with such danger or make that power depend on whether the pipe line is denominated a private or a common carrier. And the fact that Champlin's operations are relatively small is not material. *Valvoline Oil Co.* v. *United States, supra,* 147.

It is submitted, therefore, that the decision below erroneously construes Section 1 of the Commerce Act to limit the jurisdiction of the Interstate Commerce Commission, and casts unwarranted doubt upon the constitutionality of this statute as properly construed. The constitutional assumptions made by the court below and its resultant reading

of the statute raise substantial questions of general importance..

Respectfully submitted,

/s/ PHILIP B. PERLMAN,
Solicitor General.
/s/ DANIEL W. KNOWLTON,
Chief Counsel, Interstate Commerce Commission.

(Clerk's Note, Copy of Court's Opinion, filed July 12, 1950, proposed Findings of Fact, Conclusions of Law and Decree submitted by the Commission, omitted here for reason incorporated elsewhere in this Record.)

BEFORE THE INTERSTATE COMMERCE COMMISSION

No. 29912 [3]

CHAMPLIN REFINING COMPANY ACCOUNTS AND REPORTS

Submitted May 10, 1949. Decided June 13, 1949

Champlin Refining Company found to be a statutory common carrier of petroleum products by pipe line in interstate commerce, and required to comply with the provisions of sections 6 and 20 of the Interstate Commerce Act

Harry O. Glasser, Nathan Scarritt, E. S. Champlin, and Samuel H. Horne for the respondent.

Harry L. Underwood for the Interstate Commerce Commission.

REPORT OF THE COMMISSION

BY THE COMMISSION:

Exceptions to the examiner's proposed report were filed by the respondent, and we have heard oral arguments. Exceptions and requested findings not discussed in this report reflected in our findings or conclusions have been given consideration and found not justified.

The title proceeding was instituted by order entered on February 2, 1948, by division 1, upon its own motion, because the Champlin Refining Company, herein called Champlin or the respondent, had failed to comply with the requirements of section 20 of the Interstate Commerce Act,[4] and our

[3] This report also embraces No. 29912 (Sub-No. 1), Champlin Refining Company Tariffs.

[4] Pertinent portions of sections 6 and 20 are shown in the appendix.

orders and regulations made pursuant thereto, with respect to accounting and the making and filing of annual and other reports.

No. 29912 (Sub-No. 1) was instituted by order entered on March 3, 1943, by division 2, upon its own motion, because the respondent had failed to comply with the requirements of section 6 of the act, and our orders and regulations made pursuant thereto, with respect to the publishing, posting, and filing of tariffs. The proceedings together constitute an investigation and inquiry into the acts, practices, and conduct of the respondent in respect of such noncompliance with the sections of the act named in the orders, with a view of making such orders as may be proper in the premises. They were heard together on a common record, and, after the hearing, were consolidated for our final determination.

Copies of our orders and regulations made pursuant to the requirements of sections 6 and 20 of the act, and copies of correspondence with the respondent in relation thereto, were made a part of the record. By agreement of counsel, certain parts of the record made in *Champlin Refining Co., Valuation of Pipe Line*, 49 Val. Rep. 463 and 542 (the latter, a report on reargument), were incorporated into this record by reference.

In the valuation proceeding, we found Champlin to be a common carrier of refined petroleum products by pipe line and to be subject to the provisions of the act. An order was entered directing Champlin to comply with the provisions of the valuation orders previously served upon it. Champlin's bill to set aside that order was dismissed by the District Court of the United States for the Western District of Oklahoma, 59 Fed. Supp. 978. On appeal, that action was affirmed by the Supreme Court. *Champlin Refining Co.* v. *United States*, 329 U. S. 29.

Aside from the total investment in the pipe-line and appurtenant facilities, now said to be $3,230,-

050.26, certain factual statements embodied in the reports in the valuation proceeding are admitted by respondent to be true for the purpose of the instant proceeding. The portion of those statements essential to an understanding of the issues before us follows:

> The Champlin is a corporation of the State of New Mexico, authorized by its charter to produce, buy, sell, and transport petroleum, to refine petroleum, and to buy, sell and deal in the refined products of petroleum. The pipe line which the Champlin owns and operates is a 516-mile gasoline pipe-line system consisting of welded 6-inch pipe extending from Enid, Oklahoma, to Rock Rapids, Iowa. In connection with the pipe line, the Champlin operates terminals with storage tanks as well as railroad and truck delivery facilities at Hutchinson, Kans., Superior, Nebr., and Rock Rapids. The construction of the portion of the pipe line from Enid through Hutchinson to Superior, 256 miles, and the terminal facilities at Hutchinson and Superior, was completed in June 1935. The portion of the terminal facilities at Rock Rapids were completed in May 1940. Storage facilities have been provided at the terminal stations with approximate capacities as follows: At Hutchinson 161,000 barrels; at Superior, 191,000 barrels; and at Rock Rapids, 330,000 barrels. The total cost of the pipe line and appurtenant facilities as of December 31, 1940, was $3,189,028.66.
>
> The Champlin also operates oil wells, an oil refinery, tank cars, filling stations, gasoline and oil bulk plants, trucks, and other equipment, all more specifically described and enumerated in the original report. It also owns all of the stock of the Cimarron Valley Pipe Line Company which owns and operates approximately 450 miles of crude oil gathering

lines in the State of Oklahoma, the principal source of crude oil for the Champlin's refinery at Enid.

* * * * *

Summarizing the se matters as of the date of the hearing, it appears that the Champlin is the sole owner of the products transported through its pipe line; it has never transported any product belonging to any other company; its pipe line has no connection with any other pipe line; there is no point at which any petroleum product can be put into the line other than at the Enid refinery; delivery of the products at the three terminal points is made from the storage tanks by means of truck racks or railroad tank-car racks and is not delivered directly from the pipe line in any instance; no tariffs have been filed with this Commission or with any State commission or regulatory body; and the right of eminent domain has never been assumed or exercised by the Champlin in connection with this pipe line.

The principal change in the practices of the respondent in recent years is in the method of pricing the products which are transported through its pipe line. In the report on reargument in the valuation proceeding the method then used was described as follows:

> In disposing of the petroleum products produced by it at its refinery at Enid, the Champlin uses two types of sales; one is known as the spot market or date-of-shipment sale, the other; or contract sale, is based on yearly contracts with its customers. The spot, or f.o.b., price of the product at Enid is normally based upon the Chicago Journal of Commerce "Group 3" (Oklahoma) prices as shown in the issue of the Thursday preceding date of

shipment. These prices are made effective at 7 a.m. Friday morning and remain in force until the next succeeding Friday, or until a change is made in the Chicago Journal of Commerce price for the particular product. The delivered price includes, in addition to the spot or f.o.b. charge at the Enid refinery, a charge called a differential which is adjusted so that the through charge to the final transportation destination of the product will equal the cost of the product at the refinery plus the through transportation cost from the refinery by rail, or other means, to final destination. The differential, therefore, represents the charge assessed by the Champlin for transporting petroleum products through its pipe line from the refinery to the pipe-line terminal.

The differential method of pricing was abandoned on May 10, 1948. On and since that date the terminal prices have been posted at each terminal, and competitive market conditions are met by allowances under these terminal prices where required. These allowances range from 1/8 cent to 1/2 cent per gallon and are intended to place respondent's products on the market at the general market price in each locality served by the pipe line. The change-over on May 10, 1948, resulted in net increases or decreases of from 1/8 to 1/2 cent per gallon at more than 70 percent of the destinations served by respondent out of its Superior and Rock Rapids terminals. A change of 1/8 cent per gallon or more is recognized in the trade as substantial. No separate charge as such is now made for transportation, either in the invoices or in any contract for the sale of its products. It is still true, however, that the terminal price as posted takes into account the total costs of operating respondent's facilities, including the pipe line, and since the prices at each terminal must be competitive, now as prior to May 10, 1948, the net price result must

necessarily approximate what it would be under the differential method, for, as stated in respondent's brief, "respondent at its terminals must meet the prices established by the sales of its competitors constituting over 98 percent of the total market."

Champlin argues that the holding of the Supreme Court in *Champlin Refining Co.* v. *United States, supra,* that the operation of respondent's line was transportation within the meaning of the act, was based upon the use of Champlin of a differential method of basing prices, and that having now abandoned that method and installed the present method of terminal pricing, it has thereby changed the character of its operations. The language of the Court relied upon in this respect was used to point out a distinction between the operations of respondent and those of the Uncle Sam Oil Company, considered by the Court, among others, in *Pipe Line Cases,* 234 U.S. 548. The language used is as follows, page 34:

> Appellant states that as to some deliveries "rail rates were used merely as a basis for calculating a delivered price, not as a charge for transportation." Even so, and even though departures from the calculated differential are substantial and frequent, we think this practice points up a significant distinction from the Uncle Sam case.
>
> We hold that Champlin's operation is transportation within the meaning of the Act and that the statute supports the commission's order to furnish information.

As above shown, the change in the pricing method was a change in name more than in substance, the resulting terminal price, now as under the differential method, generally being the price made necessary by competition and, as such, including the transportation cost or as much of it as was or is

permissible under the prevailing competitive conditions. There is no reason to believe that the Court would have reached a different conclusion had approximately the same pricing results been reached by a method other than the differential basis then in use.

As in the valuation proceeding, respondent contends, basically, that it is not a common carrier and that its pipe-line operation is not transportation within the meaning of the act. An understanding of the arguments advanced under this contention requires a discussion of certain additional facts bearing upon respondent's operation. Champlin's marketing area, generally speaking, embraces the States of Kansas, Iowa, Minnesota, Nebraska, Colorado, and South Dakota. For all practical purposes, the entire capacity of the pipe line is used in transporting the products of Champlin's refinery for distribution in this area. Only about 1.98 percent of the total gasoline consumed in the area is moved through the pipe line and sold from respondent's terminal storage facilities. The capacity of the pipe line, 9,800 barrels a day, represents only 5 percent of the total products pipe-line capacity served by its Superior terminal and only 7 percent of the total products pipe-line capacity served at markets adjacent to the Rock Rapids terminal. The total capacity of the common-carrier lines into the Nebraska market is about 13 times that of the Champlin line and about 10 times that of the latter into the Iowa market. The common-carrier pipe-line capacity available to refineries in Oklahoma and Kansas aggregates 172,800 barrels a day, and respondent's pipe line is the smallest of any common-carrier or private pipe line operating in this territory. Apparently common-carrier pipe-line transportation is available to any small refiner in this area desiring such transportation.

Champlin's daily refining capacity of 18,000 barrels is small compared with the capacity of its

large competitors in the same area. There are 86 wholesale outlets, including refineries, pipe-line terminals, and barge terminals, in this marketing area which are competing for the business of practically every prospective customer and, in addition, any jobber in the area may purchase his products from the 60 or more refineries in Oklahoma, Kansas, Arkansas, Illinois, Indiana, Texas, Wyoming, and Montana, which deliver petroleum products into the territory by truck and rail.

The foregoing facts are cited by respondent to show that its pipe line is not clothed with a public interest, and, in fact, is not needed for public transportation. It points out that in both *Pipe Line Cases, supra,* and *Valvoline Oil Co.* v. *United States,* 308 U. S. 141, the pipe-line transportation therein concerned, excepting that of the Uncle Sam Oil Company in the first proceeding, was held to be transportation within the meaning of the act because the pipe-line companies were carrying for others "all oil offered," as in the first proceeding, and a "public interest" was found in the sole means of transporting this commodity from thousands of wells for thousands of producers," as in the second proceeding. In contrast respondent emphasizes that it refines its own oil, moves only its own storage facilities, where some of them are further processed, and subsequently markets its products from its storage tanks in the ordinary course of business.

Champlin insists that upon the facts presented its status must be held to be similar to that of the Uncle Sam Company above referred to. With respect to the operation of that company, the Court said in *Pipe Line Cases, supra,* page 562, that it was "simply drawing oil from its own wells across a State line to its own refinery for its own use." The Court considered that this was not transportation within the meaning of the act. The situation before us differs. Champlin's pipe line is not used for drawing oil to its own refinery. It is used to

transport refined products from the refinery to interstate points for sale.

Before proceeding further, it is well to call specific attention to the provisions of the act with which we are dealing. Except for minor revisions in language, these provisions as they affect pipeline companies are the same today as they were at the time of *Pipe Line Cases, supra*, 35 years ago. Section 1 of the act reads, in part, as follows:

> (1) That the provisions of this part (Part I) shall apply to common carriers engaged in—
>
> * * * * *
>
> (b) The transportation of oil or other commodity, except water and except natural or artificial gas, by pipe line, or partly by pipe line and partly by railroads or by water; * * * from one State * * * to any other State * * *.
>
> * * * * *
>
> (3) (a) The term "common carrier" as used in this part shall include all pipe-line companies; * * *

In *Pipe Line Cases, supra*, pages 560-561, the Court said:

> The control of Congress over commerce among the States cannot be made the means of exercising powers not entrusted to it by the constitution, but it may require those who are common carriers in substance to become so in form. So far as the statute contemplates future pipe lines and prescribes the conditions upon which they may be established there can be no doubt that it is valid.

More than 20 years elapsed following that decision before Champlin's pipe line was constructed. In interpreting the term "common carrier" as used

in section 1 of the act, the Court said in *Champlin Refining Co.* v. *United States, supra,* pages 34-35:

> Admittedly Champlin is not a common carrier in the sense of the common law carrier for hire. However, the Act does not stop at this but goes on to say that its use of the term "common carrier" is to include all pipe-line companies—a meaningless addition if it thereby included only what the term without more always had included. * * * The power of Congress to regulate interstate commerce is not dependent on the technical common carrier status but is quite as extensive over a private carrier.

Respondent argues that if it is required to comply with the provisions of section 6 of the act with respect to the filing of tariffs, it will be assuming the duties of a common carrier and thus be committing itself to open its line to the use of the public, so that its competitors could establish physical connections with it and largely absorb its line for their own use, thereby depriving the refinery served by the pipe line "of the only available market which it has built up through the years, and upon which the existence of the company depends." Thus, the effect of such an order it argues, would be to convert its private property to public use without its consent, contrary to the due process clause of the Constitution. It calls attention to the following observations made by the Court in *Champlin Refining Co.* v. *United States, supra,* page 35, in response to a similar contention made therein:

> But our conclusion rests on no such basis and affords no such implication. * * * The appellant in its entire period of operation has never been asked to carry the products of another and may never be. So far, the Commission has made no order which changes the appellant's obligations to any other company or person. If it does, it will be timely to consider concrete

requirements and their specific effects on appellant.

Respondent is not contending that its subjection, insofar as the pipe-line operation is concerned, to the requirements of section 20 of the act would be the equivalent of converting its private property to public use, in contravention of the fifth amendment. As stated, the provisions of part I of the act are specifically made to apply to common carriers engaged in the transportation of oil by pipe line, and the term "common carrier" as used in that part includes "all pipe-line companies." The Supreme Court has held that Champlin's operation is transportation within the meaning of the act. After referring to the holding relating to the Uncle Sam company in *Pipe Line Cases, supra,* the Court said, page 33:

> But we think it would expand the actual holding of that case to apply its conclusion to Champlin. The controlling fact under the statute is transporting commodities from State to State by pipe line.

The controlling facts surrounding the operation of this pipe line including the pricing method in its ultimate result, are the same now as they were then.

As pointed out, respondent in its pipe line has never transported oil belonging to another, and there has never been and is not now any physical connection between its pipe line and any other pipe line or facility which would permit the use of respondent's line by any one but its owner. So far as appears, no other pipe-line company has threatened to force such a connection, and because of the ample common-carrier pipe-line facilities available, as revealed by respondent, no refinery would be likely to interest itself in such a connection. Nor are we referred to any order of this or any other governmental agency which would

require such a result, or to any law, State or Federal, which would support such an order. So far as appears, therefore, the filing of tariffs and of annual and other reports would not prove to be a hardship to respondent and would not deprive it of any of its traffic or of the free use of its property, including the pipe-line facilities, without interference from its competitors.

Whether or not the effect of a requirement that respondent comply with the provisions of section 6 or section 20 of the act would be tantamount to taking private property for public use in contravention of the fifth amendment is an issue the determination of which is peculiarly within the province of the courts, and we shall make no attempt to pass upon it. All we are called upon to do, and all we are attempting to do here, is to determine whether or not the facts presented warrant a finding that respondent's pipe-line operation is "transportation" of a "common-carrier" as those terms are used in section 1 of the act and as they have been interpreted by the Supreme Court.

We find that the Champlin Refining Company is a statutory common carrier of refined petroleum products by pipe line from one State to other States, and that it is subject to the provisions of the Interstate Commerce Act. An appropriate order will be entered requiring compliance with the provisions of sections 6 and 20 of the act.

SPLAWN, Commissioner, dissenting in part:

I disagree with the conclusions and finding in this report which require respondent, Champlin Refining Company, to comply with section 6 of the act concerning the publishing, posting, and filing of tariffs.

Transportation of petroleum products by pipe line was made subject to the act by an amendment in 1906. The circumstances in which that amend-

ment was passed are stated in *Pipe Line Cases*, 234 U. S. 548, 558-559. In that proceeding, certain large oil companies, through their ownership of pipe lines, had obtained a monopoly of the only practicable oil transportation between the oil fields east of California and the Atlantic Ocean, and refused to transport any oil unless it was sold to them. The Court sustained our order which required those companies to file tariffs, pointing out (p. 560) that the "evident" purpose of the amendment "was to bring within its scope pipe lines that although not technically common carriers yet were carrying all oil offered, if only the offerers would sell at their price."

Here, the material factual situation is quite different. The pipe line under consideration in the instant proceeding is owned by Champlin, and the line always has been used exclusively to transport Champlin's own refined petroleum products from its refinery at Enid, Okla., to its storage facilities at Hutchinson, Kans., Superior, Nebr., and Rock Rapids, Iowa. Champlin utilizes the entire capacity of this pipe line on a full time basis.

Thus, the evidence is clear that there has been, and is, no holding out by Champlin of a common-carrier service either directly or indirectly. None of the products moved through the line has ever been purchased from any other interest. Moreover, the evidence shows that the products transported through Champlin's pipe line constitutes an inconsequential part of the total volume of products that moves by pipe line to the consuming territory served by Champlin from its storage facilities.

Requiring Champlin to comply with our valuation orders and the requirements of section 20 of the act with respect to accounting and the filing of annual and other reports is one thing, but to require it to file tariffs and thereby obligate itself to transport oil products of others in common-carrier service, to the exclusion of its own, is

something entirely different. The Supreme Court, in sustaining our valuation orders, it seems to me, recognized that there might be some such distinction. Concerning appellant's (Champlin's) contention that our valuation orders convert a private pipe line into a public utility and require a private carrier to become a common carrier, the Court said "But our conclusion rests on no such basis and affords no such implication." And after pointing out that our valuation orders only required Champlin to furnish certain information as to facilities being used in interstate marketing of its products, the Court held that, "The Commerce power is adequate to support this requirement whether appellant be considered a private carrier or a common carrier." *Champlin Refining Co.* v. *United States,* 329 U. S. 29, 34-35.

I cannot agree with the conclusion in this report that the filing of tariffs by Champlin will not be a hardship, or deprive it of the free use of its pipeline facilities in the conduct of its refining business. On the contrary, it is reasonable to assume that Champlin will be called upon to perform the transportation service held out under its duly published tariffs; otherwise, it seems we are requiring a vain act for which there is no justification in law or sound reason.

The publishing of tariffs pursuant to the finding in this report will place upon Champlin the legal obligation to perform the transportation service specified in those tariffs, and to conform to the requirements of section 1 (4) of the act which provides that "It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates" et cetera.

The purpose of the amendment in 1906 was to protect small independent producers from mo-

nopoly power. This report construes that amendment so as to convert into a common carrier the pipe line wholly owned and completely utilized by a relatively small independent company, though the company is wholly dependent upon such facility exclusively owned and used in the conduct of its refining business. This ultra literal construction regardless of differing conditions and circumstances might well have the effect of destroying small independent companies instead of affording them the protection intended by the amendment.

MITCHELL, *Commissioner,* dissenting:

I cannot agree that Champlin is a common carrier by pipe line subject to our jurisdiction. That all pipe lines crossing State lines are subject to the Interstate Commerce Act is negatived by *Pipe Line Cases,* 234 U. S. 548, where with respect to the Uncle Sam Oil Company, the Supreme Court expressly holds that private pipe-line transportation is lawful notwithstanding the terms of the Interstate Commerce Act.

The facts are not in dispute. Champlin has never sold products from the refinery at Enid. The products are sold from its three storage terminals. The products are never consigned to any particular customer. Champlin is the sole owner of the products in storage which have come to rest as a mere incident of Champlin's private business. The change in pricing method removes one of the grounds on which the Supreme Court found that Champlin came under the act for the purpose of valuation reports. It is to be remembered that Champlin supplies less than 2 per cent of the gasoline consumed in the marketing area.

Section 19a provides only that we shall report the value of all property owned or used by every common carrier subject to the provisions of the act. It is necessary to go to section 1 (1) (b) and section 1 (3) to determine when an enterprise is

subject to the act. Section 1 does not contemplate that a pipe line carrying only its own products as an incident to its principal business and not offering its services to the public is engaged in the transportation of oil as a common carrier. Section 1 (3) (a) in stating that the term common carrier includes all pipe-line companies obviously means all of those pipe-line companies engaged in the interstate transportation of oil for the public. It could not include pipe lines wholly within a State unless such pipe lines engaged in interstate transportation for all who offered shipments.

To require that Champlin publish and file tariffs with us can only be for one purpose, viz: to make Champlin's pipe lines available for use by all shippers. If that is not the purpose, then the requirement that tariffs be filed is an idle and futile gesture. If, following the filing of tariffs, Champlin's pipe line is used by other shippers, then to the extent of that use we are depriving Champlin of the use of its own pipe line for its own products.

The majority find that the entire capacity of the pipe line is used in transporting the products of Champlin's refinery. If the pipe line is not used by others, Champlin will be the carrier and the sole shipper. Champlin will tender shipments to itself; it will bill itself; it will give notice of arrival at destination to itself; and it will pay itself. It was never intended that an interpretation of the act should bring about such a situation.

Commissioners Patterson and Johnson did not participate in the disposition of this proceeding.

Endorsed: Filed in District Court October 25, 1950.

Harry O. Glasser and Dan Moody (Nathan Scarritt and E. S. Champlin were on the brief) for plaintiff.

William D. McFarlane, Special Asst. to the Atty. General, (Frederick R. Hanlon, Special

Atty., Herbert A. Bergson, Asst. Atty General, James E. Kilday, Special Asst. to the Atty. General, Robert E. Shelton, United States Atty., were on the brief) for the United States of America.

S. R. Howell, Atty., Interstate Commerce Commission, (Daniel W. Knowlton, Chief Counsel, Interstate Commerce Commission and H. L. Underwood, Asst. Chief Counsel, Interstate Commerce Commission were on the brief) for intervening defendant.

Before PHILLIPS and MURRAH, Circuit Judges, and VAUGHT, District Judge.

PHILLIPS, Circuit Judge.

Champlin Refining Company[5] brought this action seeking a judgment enjoining the Interstate Commerce Commission[6] from enforcing an order requiring Champlin "to file with the * * * Commission annual, periodical, or special reports as required by the provisions of paragraphs (1) and (2) of Section 20 of the Interstate Commerce Act[7] * * * and the orders and regulations of the * * * Commission made pursuant thereto"; "to institute and henceforth maintain a uniform system of accounts applicable to pipe lines, as required by the provisions of paragraphs (3), (4) and (8) of Section 20 of the Interstate Commerce Act * * * and the orders and regulations of the * * * Commission made pursuant thereto," and "to publish and file tariff schedules showing the rates and charges for interstate transportation of refined petroleum products between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been estab-

[5] Hereinafter called Champlin.

[6] Hereinafter called the Commission.

[7] 49 USCA § 20.

lished, upon notice to" the Commission and the general public "by not less than 30 days' filing and posting in the manner prescribed in Section 6 of the Interstate Commerce Act," and adjudging such orders to be invalid.

Champlin owns and operates a pipe line extending from its refinery at Enid, Oklahoma, to storage tanks owned by it at Hutchinson, Kansas, Superior, Nebraska, and Rock Rapids, Iowa. The only openings in the pipe line are at the refinery at Enid and at such storage tanks. Such pipe line has no connection with any other pipe line. Champlin could not transport the petroleum products of others without constructing facilities for receiving such products into its line and without constructing terminal facilities for delivering such products at the end of their transportation. Champlin uses the pipe line exclusively for the moving of gasoline, kerosene and tractor fuel from its refinery at Enid to such storage tanks. Such petroleum products so moved are discharged from its pipe line into such storage tanks where, at times and before the sale thereof, certain blending of the products is done, which necessarily has an effect on their quality. At the three terminals Champlin maintains loading racks designed to load products from the storage tanks into railroad tanks cars and tank trucks. Champlin is the manufacturer and sole owner of all of the products moved through its pipe line. It has never transported products belonging to any other person, firm or corporation. It has never proffered the service of its pipe line to any other person, firm or corporation, exchanged with any other person, firm or corporation any petroleum products which have moved through its pipe line, filed any tariffs or rates with the Commission, or with any state regulatory agency, or assumed or exercised the right of eminent domain in connection with its pipe line.

Champlin markets the products that move through its pipe line only after they have come to rest in storage tanks at one of the three terminals, and in certain instances after additional processing. All products which have been shipped through the pipe line belong to Champlin and it retains title thereto until sales are made from its bulk storage tanks at one of the terminals. In no instance has it made a sale on condition that the product sold would be shipped by means of the pipe line.

A prior action brought by Champlin (Champlin Refining Co. v. United States et al., 59 F. Supp. 978, 329 U. S. 29) involved an order of the Commission requiring Champlin to file under the provisions of § 19a of the Interstate Commerce Act, inventory, schedules, maps and charts of its pipe line property, in compliance with Commission Valuation Orders Nos. 26 and 27.

At the time of the trial of the prior case, there was involved in Champlin's marketing system a factor, which for convenience was referred to as the "differential," being a sum added to the sale price of products F.O.B. the Enid refinery.[8] The amount to be so added was determined by competitive prices in the marketing areas, and was a device for meeting competitors' prices. The differential was a sum, which when added to the sale price at the Enid refiner, resulted in a sale price f.o.b. the pipe line terminals, that enabled the purchaser to move the products from the storage tanks, where he made his purchase, to his place of business by means of his own choice, with a total resulting cost to him that did not exceed the sum for which he could have bought such products from Champlin's competitors, delivered to the purchaser's place of business. Some-

[8] The price f.o.b. Enid is normally based upon the Chicago Journal of Commerce "group 3" (Oklahoma) prices as shown in the issue of the Thursday preceding the date of shipment.

times, but not always, depending upon competitive prices, the differential would equal or approximate the difference between the cost of the through freight haul from the Enid refinery to the purchaser's place of business, less the cost of the local freight haul from the storage tanks to the purchaser's place of business. However, the differential varied constantly, depending upon the price at which competitors in the market territory were selling like products. Competitive prices, and not the cost of transportation or freight charges, determined the amount of differential. Any relation between the differential and the cost of transportation was incidental, because the controlling factor in arriving at the amount of the differential was the price at which the stronger marketers in the market territory offered their products for sale.

On May 10, 1948, and before the promulgation of the orders here involved, Champlin abandoned the differential method of pricing. In lieu of that method Champlin has adopted the policy of posting prices at each of its terminals. Where competitive marketing conditions require it, Champlin makes allowances from the posted prices so that purchasers in such instances buy below the posted prices and thus Champlin meets the competitive market prices in the sale of its products. These allowances range from 1/8 to 1/2 cent per gallon, which are substantial amounts, and enable Champlin to put its products on the market in competition with other stronger marketers in the market area. On May 10, 1948, the change in pricing method reflected net increases or decreases of from 1/2 cent to 1/8 cent per gallon at more than 70 per cent of the destinations served by Champlin out of its Superior and Rock Rapids terminals.

The capacity of Champlin's pipe line is 9,800 barrels per day, as against common carrier pipe line capacity of 172,800 barrels per day, available

to refineries in Oklahoma and Kansas. Champlin's pipe line capacity is approximately five per cent of the total products pipe line capacity serving Superior and seven per cent of the total pipe line capacity serving Rock Rapids. It is the smallest pipe line serving the territory. Only 1.98 per cent of all the gasoline consumed in the area served by Champlin's pipe line is moved through its pipe line and sold from its terminal storage facilities. Champlin occupies such a relatively minor place in the gasoline market in the middle west that it is in no position to control the price of gasoline, kerosene, or tractor fuel, either by raising or lowering the price thereof. It is in no position to support price advances against its competitors or survive price cutting of its competitors.

By the Act of June 29, 1906 (the Hepburn Act) 34 Stat. 584, Congress first acted to regulate interstate transportation of oil by pipe lines. The part of that Act here material, reads as follows:

> "Sec. 1. That the provisions of this Act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, who shall be considered and held to be common carriers within the meaning and purpose of this Act, and to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment), from one state or territory of the United States, or the District of Columbia, * * *"

By the Act of February 28, 1920, 41 Stat. 456, 474, amending the Interstate Commerce Act §1 of that Act was amended to read, in part, as follows:

> "Sec. 400. * * *
>
> "(1) That the provisions of this Act shall apply to common carriers engaged in— * * *
>
> "(b) The transportation of oil or other commodity, except water and except natural or artifical gas, by pipe line, or partly by pipe line and partly by railroad or by water; * * *
>
> "(3) The term 'common carrier' as used in this Act shall include all pipe line companies; telegraph, telephone, and cable companies; operating by wire or wireless; express companies; sleeping car companies; and all persons, natural or artificial, engaged in such transportation or transmission as aforesaid as common carriers for hire."

By the enactment of the Communications Act of 1934, 48 Stat. 1064, 1102, the provisions of the Interstate Commerce Act, as amended, in so far as they related to communications by wire or wireless, or to telegraph, telephone or cable companies operating by wire or wireless, except certain provisions not here material, were repealed, so that the phrase, "telegraph, telephone, and cable companies operating by wire or wireless," was eliminated from the definition of common carrier in the Interstate Commerce Act.

The question presented is whether Champlin is so engaged in the transportation of petroleum products by pipe line within the meaning of §1 of the Interstate Commerce Act, as amended by §400 of the Transportation Act of 1920, that the Commission may require it to transport the petroleum products of others as a common carrier for hire. Admittedly, Champlin's operations fall within the literal language of such § 1, but to construe the statute literally would result in far-reaching con-

sequences, and in our judgment would raise grave constitutional questions.

In the Pipe Line Cases, 234 U. S. 548, the facts were these: Standard Oil Company and its affiliates controlled the only practical means of oil transportation in the area lying between California and the Atlantic seaboard and carried much the greater part of the oil transported in such area. They made use of their monopoly of such means of transportation by refusing to carry oil through their pipe lines unless the producers of the oil would first sell their oil to them at prices dictated by Standard. They carried "everybody's oil", but imposed as a condition to the transportation that the oil be sold before it would be received into their pipe lines.[9] It was that situation which prompted Congress to enact that part of §1 of the Hepburn Act, which dealt with the transportation of oil by pipe lines.[10]

The Supreme Court held that Standard and its affiliates were common carriers of oil in everything but form; that they were common carriers in substance because they purchased and carried all oil offered; that the amendment applied to them; that Congress, under the commerce clause, could require those who are common carriers in substance to become so in form, and that while it did not compel them to continue to carry oil, it required them not to continue to carry oil except as common carriers.[11] In the same decision the Supreme Court held that the Uncle Sam Oil Company, although it operated a pipe line through which it transported its own oil, drawn from its own wells, across a state line to its refinery for processing at the refinery, was beyond the reach

[9] 234 U. S. 558, 559, 560, 561.

[10] Pipe Line Cases, 234 U. S. 548, 558-561; Valvoline Oil Co. v. United States, 308 U. S. 141, 146; 40 Congressional Record 6361, 6365, 7000.

[11] 234 U. S. 560, 561.

of the amendment because it was not engaged in the transportation of oil as a common carrier within the purview of the amendment.

And in Valvoline Oil Co. v. United States, 308 U. S. 141, in distinguishing its operation from that of the Uncle Sam Oil Company, the court said:

> "But that company's (The Uncle Sam Oil Company) pipe line was used for the 'sole purpose of conducting oil from its own wells to its own refinery.' This was held not to be tranportation under the Act. Here, however, it is the purchase from many sources and subsequent carriage that determine the applicability of the statute to Valvoline."

In the Valvoline case the interpretation of the Hepburn Act of 1906 in the Pipe Line Cases was held to have been carried into the Act, as amended in 1920, despite certain changes in language.

If Champlin, in response to the Commission's order, should publish and file tariff schedules showing its rates and charges for interstate transportation of refined petroleum products between different points on its pipe line, that would constitute an implied invitation to the public to tender petroleum products for transportation by Champlin's pipe line and would convert it from a carrier solely of its own products into a common carrier of products of others, for hire.

The question whether Congress, acting through the Commission, may thus convert a private pipe line into a public utility and require a private carrier to become a public carrier without violating the due process clause of the Fifth Amendment was not involved in Champlin Refining Co. v. United States et al., 329 U. S. 29. The court there said:

> "Appellant further contends that, as so construed, the Act exceeds the commerce power of Congress and violates the due proc-

ess clause of the Fifth Amendment because, it is argued, this interpretation converts a private pipe line into a public utility and requires a private carrier to become a common carrier. But our conclusion rests on no such basis and affords no such implication. The power of Congress to regulate interstate commerce is not dependent on the technical common carrier status but is quite as extensive over a private carrier. This power has yet been invoked only to the extent of requiring Champlin to furnish certain information as to facilities being used in interstate marketing of its products. The commerce power is adequate to support this requirement whether appellant be considered a private carrier or a common carrier."

And in *Valvoline Oil Co.* v. *United States,* 308 U. S. 141, 146, the court said

"Appellant presses its argument beyond the question whether it comes under the Act. If it does, it urges, the Act is in violation of the due process clause in that by the involuntary change of status from private to common carrier its property is taken. It looks upon the various regulatory provisions of the Interstate Commerce Act as inseparable from the valuation provisions of §19A(a) and (e). The losses feared, from present or future legislation other than the valuation provisions, may never occur. The data required by the present order may never be used to fix rates. No such information as to other pipe lines has been so used. Publicity alone may give effective remedy to abuses, if any there be. This legislation was intended to free interstate commerce in oil from practices believed to be detrimental, and in that connection accessibility of valuation information to the Con-

gress is essential. Its separate significance being apparent, we confine ourselves to §19A(a) and (e).

In the prior action the question involved was whether the Commission could require Champlin to furnish certain information under §19a of the Interstate Commerce Act, which the Supreme Court held could be required of a private carrier. Compliance with the order here involved would convert Champlin into a common carrier for hire. The power to regulate a private carrier in interstate commerce is one thing, but the power to compel a private carrier either to cease its operations as such, or to become a common carrier and to carry the goods of others for hire is quite a different thing.

We are of the opinion that Congress did not intend § 1 of the Hepburn Act and §400 of the Transportation Act of 1920 to subject carriers of oil by pipe line, who carry only their own products and who are not, at least, common carriers in substance, to regulations requiring them to transport the products of others as common carriers for hire. Here, Champlin transports its own petroleum products through its pipe line to storage tanks at the three terminal points. It has never transported products belonging to any other person, firm or corporation. It markets its products only after they have come to rest in such storage tanks, and in certain instances after additional processing. It retains title to such products until the sale thereof from its bulk storage tanks at one of the terminals. It has never made a sale on condition that the product sold would be shipped by means of its pipe line. Of course, the products have a greater sale value at the terminal points than they would have f.o.b. the refinery, because if the purchaser bought at the refinery he would have to incur the cost of transportation to his place of busi-

ness and deliveries can be made to the purchaser with greater expedition and convenience from the terminal points. Naturally, the cost of transportation to some extent is reflected in the selling prices at the terminal points, but the selling prices at such points are not the Enid f.o.b. price, plus the cost of transportation. They are determined by the prices in a competitive market and are prices that enable Champlin to sell its products in competition with other marketers of petroleum products. Champlin is not a common carrier, either in fact or in substance.[12]

In the Pipe Line Cases, Standard and its affiliates enjoyed a monopoly and compelled, as a condition of transportation, other producers of oil to sell to them at their prices, but they carried everybody's oil. Here, Champlin enjoys no monopoly, transports its own products, and after they have come to rest in storage tanks at terminal points, sells them, not at prices dictated by it, but at prices compelled by competition in the market. It supplies a very small percentage of the gasoline consumed in the area. Its acts create competition and do not enable it to foster or enjoy a monopoly.

We conclude that Champlin is not in substance a common carrier of petroleum products and may not be required to construct receiving facilities and delivery facilities and carry the petroleum products of others as a common carrier for hire, or cease operation of its pipe line, and that to hold otherwise would be to take its property without due process of law, in violation of the Fifth Amendment.[13]

---

[12] Cf. Pennsylvania Railroad Co. v. Public Utilities Commission of Ohio, 298 U. S. 170; Pennsylvania R. Co. v. Pittsburgh, L. & W. R. Co., 6 Cir., 83 F. 2d 861.

[13] Producers Transportation Company v. Railroad Commission of the State of California, 251 U. S. 228, 230, 231.

MURRAH dissenting:

In the former case, 59 Fed. Supp. 978, we held the identical operations of this plaintiff within the jurisdiction of the Interstate Commerce Commission as a statutory "common carrier engaged in the transportation of oil * * * by pipe line" under Section 1 of the Interstate Commerce Act, as amended. We accordingly sustained the jurisdiction of the Commission to require the plaintiff to furnish valuation reports under Section 19(a) of the Act.

Our decision was affirmed in Champlin v. United States, 329 U. S. 29, the Court specifically holding that "Champlin's operation is transportation within the meaning of the Act, and that the statute supports the Commission's order to furnish information."

There is no actual difference in this case and the former, and in my judgment, it should be affirmed on the authority of that case.

If the Commission is authorized to require Champlin to comply with the provisions of Section 19(a) of the Act as a common carrier subject to the Act, I can see no justifiable basis for denying jurisdiction to require compliance with Sections 20 and 6 of the same Act. In either case, jurisdiction of the Commission over Champlin as a common carrier, subject to the provisions of the Act, is an indispensable prerequisite to the exercise of its asserted authority. If it has jurisdiction under one Section of the Act, it assuredly has jurisdiction under the other.

The only suggested distinction between this case and the former is that Champlin has now abandoned the price differentials between F.O.B. refinery and the terminal points. The differentials in the former case were intended to reflect the railroad transportation charges between the refinery and the terminals. But in any event, the prices F.O.B. refinery fluctuated to meet competitive

prices at the terminal. Now Champlin has adopted the more realistic method of posting prices at each terminal, with allowances to meet the competitive market price. The result is no different—in each case the transportation cost is an indispensable factor in the price structure.

There is nothing in the order of the Commission which has the effect of requiring Champlin to convert its private pipe line into a common carrier in fact. Certainly there is nothing in the order requiring Champlin to provide new inlets or outlets, or for that matter, to make any structural or operational changes in its system whatsoever.

Although the importance of this Regulation of the Interstate Commerce Commission may not be manifest on the facts of this record, the asserted authority of the Commission undoubtedly bears a permissible relationship to interstate transportation of oil commodities from point of production to point of consumption.

I would sustain the jurisdiction of the Commission and dismiss the action.

Endorsed: Filed in District Court July 12, 1950.

Findings of Fact

In compliance with Rule 52(a), Rules of Civil Procedure, the Court makes and files the following findings of fact and separately states the controlling conclusions of law in this action.

1. Plaintiff Champlin Refining Company (hereafter called Champlin) is a private corporation, incorporated under the laws of the State of New Mexico. It owns and operates a crude oil refinery located at Enid, Oklahoma, by means of which it reduces crude petroleum to gasoline, kerosene, fuel oil and other products. In connection with its refinery and as a part of its operation, Champlin owns and operates a six inch pipe line extending from its refinery to storage tanks owned by Champ-

hn and located at or near Hutchinson, Kansas, Superior, Nebraska, and Rock Rapids, Iowa.

2. On June 13, 1949, the Interstate Commerce Commission made an order that Champlin be required "to file with the * * * Commission annually, periodical, or special reports as required by the provisions of paragraphs (1) and (2) of Section 20 of the Interstate Commerce Act * * * and the orders and regulations of the * * * Commission made pursuant thereto"; "to institute and henceforth maintain a uniform system of accounts applicable to pipe lines, as required by the provisions of paragraphs (3), (4) and (8) of Section 20 of the Interstate Commerce Act * * * and the orders and regulations of the * * * Commission made pursuant thereto"; and "to publish and file tariff schedules showing the rates and charges for interstate transportation of refined petroleum products between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established, upon notice to" the Commission and the general public "by not less than 30 days' filing and posting in the manner prescribed in Section 6 of the Interstate Commerce Act."

This order was directed against Champlin in the operation of the above mentioned pipe line and this suit was brought to enjoin the Interstate Commerce Commission from enforcing the above described orders and for an adjudication that said orders are invalid.

3. Champlin uses the above described pipe line exclusively to move its gasoline, kerosene, tractor fuel and burning oil from its refinery at Enid to its storage tanks at Hutchinson, Superior and Rock Rapids. The movement is an incident to the manufacture or refining of such products.

The products so moved are discharged from the

pipe line into Champlin's said storage tanks. Champlin has always done some blending and treating of such products, after the same come to rest in such storage tanks, which necessarily has an effect on their quality. At the time of the trial, Champlin was constructing Ethyl plants at or near the Superior and Rock Rapids storage tanks for use in further treating and preparing for sale gasoline stored at those terminals.

4. At each of the three terminals Champlin maintains loading racks which are used by Champlin to make delivery of products from such storage tanks to purchasers.

5. Champlin uses the entire capacity of its pipe line on a full time basis in moving the products of its refinery to storage. The pipe line is what is known in the industry as a products line and is a plant facility.

6. Champlin is the manufacturer and sole owner of all of the products moved through its pipe line. The bulk of the products of Champlin's refinery is moved by means of this private pipe line to the above described storage facilities at the three points mentioned. Champlin uses the pipe line exclusively for the movement of its own products; it has never moved products belonging to any other person, firm or corporation, or moved products for any other person, firm or corporation, and it has never proffered the service of its line to any other person, firm or corporation.

7. Champlin has never exchanged products moved through its pipe line for products of any other manufacturer or marketer of petroleum products, or for any other commodity of any other person.

8. Champlin has never filed any tariff schedules or rates with the Interstate Commerce Commission or with any state regulatory agency, or assumed or exercised the right of eminent domain in connection with its pipe line.

9. Champlin markets the products that have been moved through its pipe line only after they have come to rest in storage tanks at the three named places and in instances of some products only after there has been an additional processing.

10. Champlin is at all times the sole owner of all products in its line and in its storage tanks at Hutchinson, Superior and Rock Rapids; and Champlin continues as such owner until the products are sold and deliverd to purchasers from the storage tanks through Champlin's loading facilities.

11. All products which have been moved by means of the pipe line were manufactured by Champlin and belonged to Champlin, and Champlin in all instances retained title thereto, until sales were later made from the bulk storage tanks in which the products had come to rest after the pipe line movement. In no instance has Champlin made a sale on the condition that the products sold would be moved by means of the pipe line or contracted for the use of the pipe line as a means of making delivery of any petroleum products. At no time have any products been placed in the line consigned to or destined for any particular purchaser.

12. Champlin transports through its pipe line to its storage tanks at Hutchinson, Superior and Rock Rapids, substantially all of the products of its refinery at Enid and sells these products from its storage tanks at said places. Champlin uses the capacity of this pipe line in moving these products to its marketing territory in and around Hutchinson, Superior and Rock Rapids, and the pipe line constitutes the only means by which Champlin can move its products to its said marketing territory on an equal marketing basis with its larger and more powerful competitors. If Champlin were compelled to share its pipe line with its competitors, the result would be to deny

to Champlin access to a market upon which Champlin's continuing in business depends.

13. Champlin's pipe line has no connection with any other pipe line, and there is no point at which any petroleum product can be put into the line other than at the Enid refinery; and there is no point at which any product can be taken out of the line except at the storage tanks at Hutchinson, Superior and Rock Rapids. It would require the construction of additional facilities to enable Champlin to take into its pipe line the products of any other person.

14. Delivery of the products to purchasers at the three terminals is made at the storage tanks by means of loading racks and in no instance has any delivery of products been made directly from the pipe line.

15. None of the products moved through Champlin's pipe line has ever been acquired by Champlin by purchase from any other person, firm or corporation.

16. For some years prior to 1935, the business of Champlin showed a steady decline because of the construction of refineries in areas near Champlin's markets, and because of the movement of petroleum products into those areas by means of products pipe lines, barge lines and transport trucks. To enable Champlin to compete with others in marketing of its products, it construced the pipe line. Use of the pipe line in moving its products to market is necessary to enable Champlin to hold its position in the market which it serves, and to survive as a competitor in the market.

17. At the time of the trial of the prior case (*Champlin Refining Company vs. United States et al.*, 59 Fed. Supp. 978, 329 U. S. 29), there was involved in Champlin's marketing system a factor which for convenience was referred to as the "differential", being a sum added to the sale price of products f.o.b. the Enid refinery. The amount

to be so added was determined by competitive prices in the marketing areas and was a device for meeting competitors' prices. The differential was a sum, which when added to the sale price at the Enid refinery, resulted in a sale price f.o.b. the pipe line terminals, that enabled the purchaser to move the products from the storage tanks, where he made his purchase, to his place of business by means of his own choice, with a total resulting cost to him that did not exceed the sum for which he could have bought such products from Champlin's competitors, delivered to the purchaser's place of business. Sometimes, but not always, depending upon competitive prices, the differential would equal or approximate the difference between the cost of the through freight haul from the Enid Refinery to the purchaser's place of business, less the cost of the local freight haul from the storage tanks to the purchaser's place of business. However, the differential varied constantly, depending upon the price at which competitors in the market territory were selling like products. Competitive prices, and not the cost of transportation or freight charges, determined the amount of differential. Any relation between the differential and the cost of transportation was incidental, because the controlling factor in arriving at the amount of differential was the price at which the stronger marketers in the market territory offered their products for sale. On May 10, 1948, (before the promulgation of the order here involved) Champlin abandoned the differential method of pricing. In lieu of that method Champlin has adopted the policy of posting prices at each of its terminals. Where competitive marketing conditions require it, Champlin makes allowances from the posted prices so that purchasers in such instances buy below the posted prices and thus Champlin meets the competitive market prices in the sale of its products. The

allowances range from ⅛th cent to 1⅛th cents per gallon.

The allowance enables Champlin to put its products on the market in competition with other stronger marketers in the area.

On May 10, 1948, the change in pricing method from "differential" to posted pricing reflected net increases or decreases of from ⅛ cent to ½ cent per gallon, at more than 70 per cent of the destinations served by Champlin out of its storage tanks at Superior and Rock Rapids. A change of ⅛ cent per gallon, or more, is recognized in the industry as substantial.

18. Competitive prices in the area are the sole basis for Champlin's prices.

19. No pipe line transportation charge is made either directly or indirectly to any purchaser of Champlin's products. No charge of any kind for transportation is stated in any invoice and no provision for transportation charge is provided in any contract made by Champlin for the sale of its products. Champlin does not change its price structure because of increase or decrease in cost of operating its products pipe line.

20. No refiner of petroleum products other than Champlin is dependent on the Champlin line as an outlet to the markets. Common carrier pipe line transportation is available to any other refiner in this area desiring such service. The capacity of Champlin's pipe line is 9800 barrels per day, as against common carrier pipe line capacity of 172,800 barrels per day available to refiners in Oklahoma and Kansas. Champlin pipe line capacity is only approximately 5 per cent of the total products pipe line capacity serving Superior; and only 7 per cent of the total products pipe line capacity serving Rock Rapids. It is the smallest pipe line serving the territory.

21. No purchaser of refined products is dependent upon the Champlin pipe line as a source of

supply. There are 86 wholesale outlets in the trade territory served by Champlin, distributing the products of 28 refineries. Every purchaser or prospective purchaser of Champlin products in this trade territory has available to him the products of these many marketers that are competing with Champlin in the sale of petroleum products. Purchasers of Champlin products buy in a competitive market and are free to sell at prices over which Champlin does not have any control. For the six months period immediately prior to the institution of the proceedings by the Commission which resulted in this action, only 1.98% of all of the gasoline consumed in the area served by the Champlin pipe line was moved through its pipe line and sold from its storage facilities.

22. If Champlin were forced to open its line to the public, its competitors could make tenders to the extent that Champlin would be deprived of any use of its pipe line, and thereby of its means of access to the market upon which Champlin depends. Twenty-three refineries (having a combined refining capacity of 365,000 barrels of crude oil per day) make deliveries of petroleum products into Champlin's trade territory through two common carrier pipe lines, one of which with more than 4 times the capacity of the Champlin line, crosses the Champlin line near Hutchinson, Kansas. Three of these refiners market petroleum products in Southwest Nebraska in quantities equalling more than 27% of the Champlin pipe line capacity in that area. These three companies could use a substantial part of Champlin's pipe line capacity and the additional 20 refiners above referred to could make tenders in excess of the total capacity of the Champlin line.

23. Champlin is what is known in the industry as an independent company. It is a small company in comparison with companies with which it competes in the area reached by its pipe line. It oc-

cupies such a relatively minor place in the gasoline market in the middle west that it is in no position to control the price of gasoline, kerosene, tractor fuel or burning oil, either by raising or lowering the price thereof; it is in no position to support price advances by its competitors or to survive price cutting by its competitors. Champlin does not have a monopoly or any power to establish a monopoly either in the transportation of petroleum products into the trade territory or in the sale of petroleum products therein. Champlin's acts create competition.

24. Champlin is not in fact a common carrier.

For the court

ORIE L. PHILLIPS,
Judge, the United States Court of Appeals, the Tenth Circuit.

EDGAR S. VAUGHT,
Judge, the United States District Court, the Western District of Oklahoma.

Aug. 28, 1950.

Endorsed: Filed in District Court August 28, 1950.

CONCLUSIONS OF LAW

1. Congress did not intend by Section 1 of the Hepburn Act, as amended by Section 400 of the Transportation Act of 1920 (41 Stat. 474) to subject carriers of oil by pipe line, who carry only their own products and are not common carriers either in fact or in substance, to regulations requiring them to transport the products of others as common carriers for hire.

2. Champlin is not a common carrier, either in fact or in substance.

3. Champlin does not enjoy a monopoly in the transportation of the products of crude petroleum

into the areas reached by its pipe line; or a monopoly in the sale of petroleum products in those areas.

4. Champlin is not so engaged in the transportation of petroleum products by pipe line within the meaning of Section 1 of the Interstate Commerce Act, as amended by Section 400 of the Transportation Act of 1920 (41 Stat. 474), that the Commission may require it to transport petroleum products for others as a common carrier for hire.

5. Although Champlin's operations may fall within the literal language of Section 1 of the Interstate Commerce Act, as amended by Section 400 of the Transportation Act of 1920 (41 Stat. 474), to construe the statute literally and to apply it to Champlin's pipe line would have the result to force Champlin, against its will, to devote its property, heretofore used only for its private purposes, to a public use.

6. If Champlin were required to file and publish schedules showing rates and charges for interstate transportation of petroleum products as directed by the order of the Interstate Commerce Commission, the filing of such schedules would constitute an offer on the part of Champlin to the public to transport through the facilities of its now private pipe line the commodities of other persons, and an implied invitation to the public to tender petroleum products for transportation by Champlin through its pipe line; and to require Champlin to file such schedules would force Champlin to convert its pipe line operations from that of a carrier solely of Champlin's own products, into that of a common carrier of products of others for hire.

7. The Order of the Commission is not supported by either the evidence before the Commission, nor by the law.

8. Compliance with the order here involved would convert Champlin into a common carrier for hire.

9. Champlin is not, in substance, a common carrier of petroleum products; and may not be required by order of the Commission to construct receiving facilities and delivering facilities, and to carry the petroleum products of others as a common carrier for hire, or cease operation of its pipe line.

10. To enforce the order of the Interstate Commerce Commission requiring Champlin to file and publish schedules showing rates and charges for interstate transportation of refined petroleum products, would be to violate the Fifth Amendment to the Constitution of the United States.

For the Court

ORIE L. PHILLIPS,
Judge, the United States Court of Appeals, the Tenth Circuit.

EDGAR S. VAUGHT,
Judge, the United States District Court, the Western District of Oklahoma.

Aug. 28, 1950.

Endorsed: Filed in District Court August 28, 1950.

DECREE

The above case came on for hearing on the 19th day of November, 1949, whereupon came the parties by their respective counsel and announced ready for trial; and, the pleadings, evidence and argument of counsel having been submitted, the Court took the cause under advisement, and upon due consideration, on July 10, 1950, announced its decision in favor of Plaintiff and against Defendant and Intervener:

IT IS NOW ORDERED, ADJUDGED and DECREED that the order of the Interstate Commerce Commission entered on the 13th day of June, 1949, in Cause No. 29,912, *Champlin Refining Company Accounts and*

Reports, and in Cause No. 29,912 (Sub.-No. 1) *Champlin Refining Company Tariffs,* copy of which order is attached to Plaintiff's complaint, is invalid and should not be enforced against Plaintiff; and the Interstate Commerce Commission, its servants, agents and employees are perpetually enjoined from enforcing or attempting to enforce said order against Plaintiff in the operation of its petroleum products pipe line, and the cross-complaint of Intervener Interstate Commerce Commission is dismissed. All costs accrued in this action are taxed against the Defendants.

ENTERED this the 28th day of August, 1950.

For the Court

ORIE L. PHILLIPS,
Judge, the United States Court of Appeals, the Tenth Circuit.

EDGAR S. VAUGHT,
Judge, the United States District Court, the Western District of Oklahoma.

Endorsed: Filed in District Court August 28, 1950.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1950 819250 373